IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1818 OF 2007
WITH
CRIMINAL APPLICATION NO. 327 OF 2007

Mr. Jaswant Chaturbhai Raval & ors. ..Petitioners

Vs.

The State of Maharashtra and ors. ..Respondents

Mr. Adhik Shirodkar, Senior Advocate with Mr. Hitesh Jain i/by Mr. Abhijit Sarwate for petitioners.

Mr. D.P. Adsule, APP for State.

Ms. P.H. Kantharia for respondent no.2-CBI.

CORAM: B.H. MARLAPALLE, J.

Date : October 24, 2007.

P.C.:

1. This petition was heard yesterday. Mr. Adhik Shirodkar the learned Senior Counsel had advanced his arguments at length and Ms. Kantharia the learned standing counsel for the respondent no.2-CBI has filed her affidavit in reply and opposed this petition.

Mr.Adsule, the learned APP appears for the State. The fax copy at Exh.57 which is in Gujarati language and brought on record before the trial court has been translated by the Official Translator in English and, therefore, the order is being dictated today.

2. The petitioners are 11 of the 19 accused who are facing trial in Sessions Case No. 634 of 2004. Remaining accused are impleaded as respondent nos.3 to 10. Accused No.18 and present respondent no.8 - B.S. Bhagora claims to have filed an application through his Advocate before the trial court on 29/8/2007 praying for issuance of witness summons to three more witnesses and the said application came to be dismissed by the impugned order dated 3/9/2007. Surprisingly, the accused no.18 has not filed the petition and it is stated across the bar that the application so filed at Exh.510 should be treated as an application on behalf of all the accused, including the present petitioners. On this ground alone the petition could have been rejected summarily. However, Mr.Shirodkar the learned Senior Counsel claimed that

the petition is by most of the accused and though the application at Exh.510 was claimed to have been filed on behalf of accused no.18, in fact, it was a symbolic application and it was supported by all the accused. It was further pointed out that some of the present petitioners and accused no.18 are being defended by a common Advocate and, therefore, the application was signed by such a common Advocate who stated that it was on behalf of the accused no.18 instead of saying that it was filed on behalf of all the accused. I, therefore, proceed to consider the petition on merits.

3. Three witnesses were sought to be additionally examined and it would be appropriate to reproduce the relevant portion of the application at Exh.510 as under:-

a) Clerk from Collectors office Dahod along with fax received in the collector office regarding the incidence, sent by Bilkis.

b) Concerned nurse associated with C.H.C.

Limkheda from 3/3/02 to 6/3/02 and who was present when Bilkis was taken to the hospital and examined by Dr. Rakesh Kumar Mahato.

c) Concerned officer of National Human Right Commission along with report submitted by him about his visit to Camp.

. The learned Judge of the trial court in the impugned order stated that in view of Section 15 of the Protection of Human Rights Act, 1993 any statement made to the Commission cannot be treated as evidence. PW 9 - Dr. Rakesh Kumar Mahato in his depositions stated that no Nurse was present at the place and the time when the prosecutrix was examined by him and so far as the fax was concerned, the prosecutrix in her depositions had stated that she had not sent any such fax to the Collector/District Magistrate, Dahod.

4. So far as summoning the concerned Nurse from C.H.C. Limkheda is concerned, in his depositions PW 9

- Dr. Rakesh Kumar Mahato, a copy of which has been placed before me by Mrs. Kantharia, has clearly stated that no Nurse was present when the prosecutrix was medically examined by him and, therefore, it is for the defence to argue on the point of the consequences of such Nurse being not present. It was contended by Mr.Shirodkar that as per the guide-lines/Rules issued from time to time, when any prosecutrix or a female is examined medically, it is necessary that a female Nurse remains present along with the Doctor. Nonetheless, as the doctor has clearly stated in his depositions that no Nurse was present at the relevant time, the application to examine 'the concerned Nurse' is an exercise in futility.

5. Summoning an Officer from the National Human Right Commission is concerned, I do not find that the trial court has committed any error and even otherwise it has not been pointed out as to how any prejudice is likely to be caused to the defence case if such an officer is not examined.

6. Now coming to the issue of summoning a Clerk of the Collector's office at Dahod, though no name has been set out in the application and the prosecution would be justified in saying that it was a very vague statement, having regards to the fax message received by the Collectorate at Dahod and the same having been exhibited before the trial court and marked as Exh.57, in my considered opinion, interest of justice could be better served if the Secretary to the Collector, Dahod is allowed to be examined before the trial court as a witness of the defence, in addition to the names already furnished. The depositions of the prosecutrix clearly indicate that she has stated before the trial court that she did not send any such fax to the Collector at Dahod and thus disowned the fax message. Perusal of the translated English version of the said fax makes be believe that the defence is justified in asking for summons to be issued to one of the officers in the Collectorate and though the Officer/Clerk has not been named, it would be proper that the Secretary to the Collector, Dahod is examined by the trial court

on the factum of receipt of the said message. No prejudice is likely to be caused to the prosecution if such an additional witness is examined.

7. Though the application was purportedly made under Section 233 (3) of Cr.P.C., the provisions of Section 311 which appear in Chapter XXIV under the heading "General Provisions as to Inquiries and Trials" empowers the trial court at any stage of enquiry or trial to summon any person as a witness. Even as of now the recording of evidence is in progress. Out of the 10 witnesses whose names were furnished by the defence, 8 were examined when the application was filed at Exh.510 on 29/8/2007. Mrs. Kantharia also invited my attention to the order passed by this court in Criminal Application No. 2869 of 2007, which reads as under:-

> "The trial has already commenced. In that view of the matter, no orders are necessary. The Court trying the case is expected to try the same without granting unnecessary

adjournments. Application is disposed of accordingly."

8. I do not find that this order will come in the way of examining one more witness on behalf of the defence and in any case the trial has not been made time bound by the order of this court.

9. Hence, it is directed that the trial court shall issue summons to the Secretary to Collector at Dahod so as to examine him as an additional witness of the defence. Summons be issued forthwith. The learned counsel for the CBI has stated, on taking instructions, that on the date given by the trial court, the Secretary to the Collector at Dahod shall be informed by fax as well as telephonically to remain present so that there is no further delay caused in the trial.

10. Petition is disposed off in terms of the above directions.

11. Criminal Application No. 327 of 2007 does not survive and shall stand disposed as such.

12. Writ to go to the trial court forthwith.

(B.H. Marlapalle,J.)